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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL NEGRON,

Defendant and Appellant.

H033719

(Monterey County
Super.Ct.No. SS080675A)

A jury convicted defendant Gabriel Negron of injuring his cohabiting girlfriend. He claims that the trial court violated his constitutional rights and abused its discretion under state law by excluding medical-records evidence to impeach the victim's testimony and that the court miscalculated his presentence custody credits. We find no infirmity in the court's evidentiary ruling but agree, as do the People, that the custody credits were miscalculated. We will direct that the judgment be modified and with that proviso will affirm the judgment.

PROCEDURAL BACKGROUND AND FACTS

I. *Procedural Background*

An information filed on January 25, 2008, charged defendant with one count of willfully inflicting corporal injury resulting in a traumatic condition on a current or

former spouse or cohabitant or the mother of the accused's child. (Pen. Code, § 273.5, subd. (a).)¹ The act allegedly occurred on or about January 6, 2008. The information also charged that defendant was convicted of having violated section 273.5 in the previous seven years, namely on October 17, 2006, thereby qualifying him for an enhanced sentence. (*Id.*, subd. (e)(1).) The information also alleged that defendant had suffered three prior prison terms that qualified him for one-year sentence enhancements. (§ 667.5, subd. (b).)²

On August 14, 2008, a jury found defendant guilty of violating section 273.5, subdivision (a). Defendant waived trial by jury on the allegations of the prior violation of section 273.5 and the prior prison terms, and a court trial was conducted at which the trial court found all of the allegations true.

The trial court sentenced defendant to the aggravated term of five years in state prison for the violation of section 273.5, subdivision (a), with a prior conviction as set forth in subdivision (e)(1) thereof. The court also imposed three consecutive one-year sentences for the three prior prison terms, pursuant to section 667.5, subdivision (b), for an aggregate sentence of eight years.

II. *Facts*

The victim met defendant in mid-October of 2007. She and defendant began to live together, along with the victim's 10-month-old son, in an apartment in Castroville. In November of that year defendant choked her and then threatened to kill her if she

¹ All statutory references are to the Penal Code unless otherwise indicated.

² Defendant informs us that an amended information was filed on August 11, 2008, containing the same charges but with modifications to the dates of alleged events. He states, and the superior court clerk certifies, that the amended information does not appear in the trial court's files. Nor do we see it in the record before us.

called the police. Defendant left but later moved back and resumed physically and verbally abusing the victim.

At some point during this time, the victim discovered that she was pregnant. She told defendant about her pregnancy sometime in November. Defendant was happy about the pregnancy initially but soon resumed being violent. He refused to believe he was the baby's father (we note that the record does not reveal that she told him he was; it does, however, suggest that she may have told him this). He kicked the victim in the stomach during her pregnancy and inflicted other injuries.

On December 14, 2007, the victim went to a clinic in Salinas. While there, she filled out a questionnaire that asked, among other things, whether she was in an abusive relationship. She indicated that she was. The clinic notified the Monterey County Sheriff's Department, but the victim refused to file a complaint.

Defendant's attacks on the victim continued as late as January 5, 2008, and she ended the relationship on that day. On January 6, the victim changed her mind about her reticence and filed a report with the sheriff's department about defendant's abuse. On January 7, a sheriff's deputy photographed her injuries. About this time the victim also decided to have and proceeded with an abortion.

DISCUSSION

I. Evidentiary Ruling Excluding Medical Records

Defendant claims that the trial court abused its discretion by excluding relevant evidence (see Evid. Code, §§ 210, 351) and violated his rights undergirded by the Fifth and/or Sixth Amendments and the Fourteenth Amendment to the United States Constitution to present a complete defense and his Sixth Amendment right to confront the witnesses against him when it excluded evidence he wished to introduce about the timing of the victim's abortion, namely medical records that might have persuaded one or more jurors that she was pregnant by another man, not defendant, and had falsely or inaccurately accused him of being the father.

The victim testified that when she told defendant she was pregnant, “[h]e would always say he wasn’t” the father. During one discussion of the topic he lashed out at her verbally and kicked her in the stomach, pulled her hair, and slapped her face. The victim also testified that her first sexual intercourse with defendant occurred on October 28, 2007. Defendant wanted to introduce impeaching evidence that an examination done on December 18, 2007, showed the age of the aborted fetus to be nine weeks, meaning that it could have been conceived in mid-October and defendant would not be the father. Under the principle of *falsus in uno, falsus in omnibus*, the impeachment evidence could cast doubt among the jurors about the veracity of the victim’s entire account that defendant physically abused her.

The record does not tell us the evidentiary basis under which the trial court considered the matter. The court ruled, however, that the evidence must be excluded because in the court’s view it was only marginally relevant and its introduction would be too time-consuming—evidently a ruling under Evidence Code section 352, which provides in relevant part that “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time” The court described its reasoning (a description that both parties agreed was accurate) following an unreported discussion with the parties about the evidence: Regarding “the potential introduction of the medical records, . . . the Court had expressed some considerable concern about the fact that this has the potential of invading the privacy of [the victim]. The Court had an opportunity to review those medical records in chambers. [¶] [Defense counsel] had indicated that she wanted to bring out certain aspects of the medical records that could potentially impeach [the victim], and I asked for an offer of proof. The offer of proof was . . . that it was very likely that [the victim] was pregnant from an earlier relationship and that medical records would show that that was indeed the case; that one could then conclude that she had lied to the defendant by indicating that he was the father of the unborn child; and that if she

was capable of lying under one circumstance, then she certainly would be capable of lying with regard to alleging that she was a victim of domestic violence.”

“The Court reviewed the medical records and determined . . . that there was the following five facts: [¶] That on December the 13th, [the victim] stated that her last menstrual period was October the 18th of 2007; second, that [the victim] had checked a box on a form indicating that she was in an abusive relationship; third, that on December the 14th the medical staff at the hospital or clinic where she was at contacted the Salinas Police Department to report an abusive relationship as required by law; fourth, that on December the 13th the stenography record indicated that someone, some medical person, wrote down the number ‘8,’ for eight weeks, next to a box asking for the estimated age of the fetus; and fifth, that on December the 18th, 2007, the pathology exam—that the exam at the conclusion of the abortion, the pathology exam, showed someone had written in there ‘age of the fetus, nine weeks.’

“I—as a result of this I had a conversation with Counsel in chambers, at which time I told them that the information was sufficiently marginal as to be of minimal relevance in determining whether or not [the victim] may or may not have been telling the truth when talking to the defendant indicating that he was the father of the child; that there were a variety of other issues involved in addressing the potential admissibility of that medical record that would indeed involve an undue consumption of court time, and for those reasons I was not going to allow the medical records into evidence.”

Defendant acknowledges that the evidence would not establish conclusively that the victim was inaccurate in other details of her testimony—e.g., the victim “might have been unaware of when her pregnancy started” or “the pathology report . . . might have been inaccurate.” But he notes that Evidence Code section 210 provides in pertinent part that “ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action” and observes that the case mainly

involved the jurors' assessment of the victim's credibility inasmuch as the case rested on the victim's testimony, buttressed only by photographic evidence that did not identify him as an assailant. In defendant's view, the question of the evidence's conclusiveness bears on "the weight of the evidence, not its admissibility. If the records had been admitted into evidence, . . . the jury could have . . . accorded them whatever significance" it found warranted. Because "the only significant decision the jury had to make was whether or not [the jurors] believed" the victim, the trial court, in defendant's view, abused its discretion by excluding the evidence and violated his constitutional rights.

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

The foregoing rule applies to limit both the admissibility of relevant evidence and the scope of our review of a ruling excluding it. " 'As with all relevant evidence . . . , the trial court retains discretion to admit or exclude evidence offered for impeachment. [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]' [Citation.] '[T]he discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.' " (*People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1128.)

Here, we cannot say that the court abused its discretion, i.e., was unreasonable to conclude that the evidence would have been unduly time-consuming in relation to its potential probative value. The medical records would not have necessarily established that the victim was misleading defendant about the identity of the unborn child's father,

only that her apparent belief that he was the father possibly was incorrect. That would not have taken anything away from the content of her testimony, and inferences that could reasonably be derived therefrom, that she apparently communicated to defendant that he was the father and he reacted badly to the news, at one point becoming angry and kicking her in the stomach, pulling her hair, and slapping her face.

As for defendant's constitutional claims, we discern no violation of any constitutional guaranty. "[F]undamental fairness [is] the touchstone of due process" (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.) Thus, for the court's evidentiary ruling to have risen to the level of a due process violation because it denied him a right to present a defense, it must have rendered defendant's trial fundamentally unfair. Because the court's ruling did not violate state law in the first instance, *a fortiori* we perceive no due process violation. That is also true to the extent that the right to present a defense implicates the Sixth Amendment and with regard to defendant's Sixth Amendment confrontation clause claim. All of these claims rests on defendant's claim of error under state law, and, therefore, because defendant's state-law claim fails, so necessarily must his constitutional claims. "[R]ejection on the merits of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990, fn. 5 [addressing a due process claim that hinged on a claim of state-law error].)

II. *Presentence Custody Credit Calculation*

Defendant claims that the abstract of judgment wrongly reflects the amount of presentence custody credit to which he is entitled. The People concede the error and we agree with defendant that error occurred.

The abstract of judgment shows that defendant is entitled to 448 days of presentence custody credit, consisting (in an erroneous summing of the two figures) of 294 days of time spent in custody and 146 days' credit for good behavior credit and

worktime credit, i.e., conduct credit. Defendant argues that the record shows he was arrested on January 7, 2008, and sentenced on November 6, 2008, entitling him to 305 days of credit for time spent in custody and 152 days' conduct credit (see § 4019), for a total of 457 days' presentence custody credit. Defendant's reading of the record and the law is correct. Regarding the record, the probation report shows that he was arrested on the date he identifies and the clerk's transcript confirms that he was sentenced on the date he identifies. The time elapsed between the two events was 305 days. The record shows that he remained in custody while awaiting trial. Regarding the law, the various provisions of section 4019, read together, "provide a total of two days of conduct credit for every four-day period of incarceration." (*People v. Dieck* (2009) 46 Cal.4th 934, 939.) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified to give defendant 457 days' presentence custody credit, consisting of 305 days' credit for his days of confinement and 152 days' conduct credit. The clerk of the Monterey County Superior Court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy of it to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P. J.

Elia, J.